

# Rule and Discretion in Comparative Perspective: The Case of Social Regulation

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## I. INTRODUCTION

Everyone has encountered the observation that the English and the Americans are peoples divided by a common language. It is also widely believed that in spite of our common legal heritage we are divided as well in our attitudes toward and use of our legal systems. To what extent is this true? Are there substantial differences between us in the way in which we use law, and the place law holds in our respective societies? Studies of litigiousness, including some which are cross-national, have attracted considerable attention in recent years among American law and society scholars.<sup>1</sup> The last few years have also seen the emergence of a number of quite detailed analyses of apparent variations in the use of law in social regulation,<sup>2</sup> by which I refer to those forms of regulatory control that are not directly concerned with the control of markets or other specific aspects of economic life, but instead aim to protect people or the environment from the damaging consequences of industrialization. It is this part of legal life upon which I intend to focus. I hasten to add that I do not intend to take sides or suggest that one approach or another is to be preferred.

First, I shall rehearse some of the general findings of a number of cross-national analyses. I will discuss in this context some of the explanations that various American scholars have put forward to account for apparent variations in the use of law in the United States as compared with its use in a number of European countries (this topic is so far an almost exclusively American preoccupation). Finally, I shall summarize some empirical data I have collected at first hand over the last several years in the course of studying a number of British regulatory agencies. I hope this part of the analysis will convey a sense of some of the everyday constraints that serve to dissuade British regulatory officials as legal actors from resorting to formal legal action.

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1. See, e.g., L. FRIEDMAN, *TOTAL JUSTICE* (1985); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 65 (1974); Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

2. See, e.g., R. BRICKMAN, S. JASANOFF, & T. ILGEN, *CONTROLLING CHEMICALS: THE POLITICS OF REGULATION IN EUROPE AND THE UNITED STATES* (1985) [hereinafter R. BRICKMAN]; S. KELMAN, *REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY* (1981) [hereinafter S. KELMAN, *REGULATING*]; D. VOGEL, *NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES* (1986); Smith, *Approaches to Environmental Legislation: A Comparison Between Practice in British and US Point Source Air and Water Pollution Regulation*, in *ENVIRONMENTALISM TODAY—THE CHALLENGE FOR BUSINESS* 69 (1986).

In discussing the place of formal legal procedures<sup>3</sup> in British social regulation, one is essentially confined to considering the part played by criminal prosecution in the courts (almost always the Magistrates' Courts, very occasionally the Crown Court<sup>4</sup>) because other forms of legal activity that may be familiar in the United States are rare or unknown across the Atlantic.<sup>5</sup> Prosecution itself is, to say the least, sparingly used by British regulatory agencies: it was commenced in a handful of cases per year by each of the ten regional water authorities;<sup>6</sup> in one or two cases a year by the Industrial Air Pollution Inspectorate<sup>7</sup> or the Mines and Quarries Inspectorate; and is virtually never used by the Nuclear Installations Inspectorate.<sup>8</sup> It is only when one looks at the numbers of prosecutions mounted by the Agricultural Inspectorate (somewhere over 300 cases a year<sup>9</sup>), or the Factory Inspectorate (around 1700 cases a year<sup>10</sup>), that the courts begin to assume a role in advancing the cause of social regulation in Britain. Note, however, that the comparatively high figures produced by these two latter agencies may be simply attributable to the fact that each has thousands of sites within its jurisdiction, and each site could yield several instances of legal violation, strictly defined. Discrepancy in use of prosecution by inspectorates may be more apparent than real.

## II. THE BIGGER PICTURE: FINDINGS OF CROSS-NATIONAL ANALYSES

### A. *Cross-National Contrasts*

Comparative studies of regulatory approaches typically analyze the situation in the United States in contrast with one or more European jurisdictions. The United States always emerges from such scrutiny as the epitome of rampant legalism and litigiousness. But it is important to avoid caricature and essential to resist oversimplification when comparing national styles of regulation. Even so, commentators who have examined the American approach in contrast with the European (particularly, for present purposes, the English) have concluded that, in general, formal law and legal procedures pervade the regulation of commercial and industrial life much more in America:

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3. I do not treat the prohibition or improvement notices which some British regulatory inspectorates may issue as a formal legal procedure since they are essentially administrative in character.

4. The Magistrates' Courts are local courts with jurisdiction limited to petty offenses. *See generally* R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 125-29, 141-42 (6th ed. 1972).

5. The private causes of action arising under social regulation legislation as well as civil actions initiated by the state are largely unknown in Britain. *See* Smith, *supra* note 2, at 95-96.

6. K. HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* 18-22, 177 (1984) [hereinafter K. HAWKINS, *ENVIRONMENT*].

7. Weait, *The Letter of the Law? An Enquiry into Reasoning and Formal Enforcement in the Industrial Air Pollution Inspectorate*, 29 *BRIT. J. CRIMINOLOGY* 57, 63 n.7 (1989).

8. K. Hawkins, *Prosecution Process* (1987) (unpublished manuscript on file at the Centre for Socio-Legal Studies but prepared for exclusive use of the British Health and Safety Executive) [hereinafter K. Hawkins, *Prosecution*].

9. Information provided by Her Majesty's Agricultural Inspectorate.

10. Information provided by Her Majesty's Factory Inspectorate.

The American system of regulation is distinctive in the degree of oversight exercised by the judiciary and the national legislature, in the formality of its rulemaking and enforcement process, in its reliance on prosecution, in the amount of information made available to the public and the extent of the opportunities provided for participation by nonindustry constituencies.<sup>11</sup>

Writers paint a similar picture of the law occupying a more central and explicit place in American social regulation than in Britain. Though the issues which are defined as appropriate for the legislative agenda are similar, and though the substance of the legislative acts and the values of social regulation that they embody may be similar, the ways in which laws are framed and the regulatory behavior associated with them seem to be remarkably different. Many cases which are bargained to a resolution in England would be dealt with in America by administrative or court-imposed sanctions.<sup>12</sup> The high degree of activism displayed by the American judiciary in reshaping or restraining regulation is unknown in England.<sup>13</sup> The practices of countless interest groups, which seek to invoke the powers of the federal courts to invalidate regulation or to compel swifter or more stringent action, seem to be characteristically American. As a recent comparative survey noted, "[m]ajor regulatory issues are seldom settled without litigation . . . [whereas even] a casual observer is struck by the vastly lower level of judicial involvement in European regulatory processes."<sup>14</sup>

Yet it seems that this was not always so. According to David Vogel, approaches to regulatory control in environmental matters used to be quite similar in Britain and the United States:

There are important similarities between the pattern of government regulation of industry established during the 1860s and 1870s in Great Britain—the period of mid-Victorian reform—and that of the Progressive Era in the United States. Both nations established systems of regulation that substituted statutory controls for the common law, made minimal use of prosecution, placed a high value on technical expertise, and encouraged regulatory authorities to act as educators rather than as policemen. . . . In America, however, the politics and administration of social regulation changed substantially in the late 1960s and early 1970s, becoming more centralized, more legalistic, more visible, and more contentious.<sup>15</sup>

It is important to bear such cautionary words in mind if we are trying to understand discrepancy and its sources, for certain kinds of explanation clearly become more persuasive than others.

However, further consideration must be given to what commentators have to say about differences in regulatory style. Three broad, interrelated themes are evident in the various comparative studies. One draws attention to the balance struck between

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11. D. VOGEL, *supra* note 2, at 267.

12. Smith, *supra* note 2, at 96.

13. The institution of judicial review in the United States and the American Constitutional doctrines of due process and separation of powers may contribute to the difference. On the effect of judicial review and the separation of powers doctrine, see Smith, *supra* note 2, at 74, 94, 95 n.7. But note *infra*, the divergence of English and American regulatory practices seems fairly recent.

14. R. BRICKMAN, *supra* note 2, at 46.

15. D. VOGEL, *supra* note 2, at 25.

legal rule and discretion in Europe and America. Another speaks to the essential formality and legalism of American regulatory processes, compared with their European counterparts. The third is concerned with the degree of stringency, legalism, or punitiveness with which these rules are implemented in America. I want to consider each of these points in turn.

First there is the balance between rule and discretion. David Vogel, who conducted an exhaustive analysis of approaches to environmental control in Britain and the United States, concluded that "the American approach to environmental regulation is the most rigid and rule-oriented to be found in any industrial society; the British, the most flexible and informal."<sup>16</sup> "The thrust of American environmental regulation," Vogel continues, "has been to restrict administrative discretion as much as possible; in Britain regulatory officials remain relatively insulated from both parliamentary and judicial scrutiny."<sup>17</sup> Similarly, in a study conducted by Turner T. Smith Jr., an American environmental law practitioner of considerable experience, we again read of radical differences in the emphasis upon rules in the United States by contrast with the emphasis upon discretion in Britain: "The US regulatory system is replete with statutes and rules that articulate the substantive policy to be applied—statutes and rules that attempt consciously to *eliminate* discretion from all stages of the administrative decisional process."<sup>18</sup>

There are many war stories to illustrate Smith's point. For instance, the U.S. Clean Air Act Amendments of 1977 amount to eight volumes and more than 7500 pages.<sup>19</sup> Similarly, Steven Kelman reports that in the early days of the Occupational Safety and Health Administration (OSHA), "one senator gathered the regulations, including those referenced but not printed in the *Federal Register*, and showed his astounded colleagues they formed a stack some six feet high."<sup>20</sup> The British preference, in contrast, is for high levels of administrative discretion. Detail is deliberately forsaken in legislative enactments: "British statutes and rules, on the whole, have little substantive content. They contain, instead, broad grants of power to the relevant bureaucracy to regulate, and impose few, if any, substantive limits on how that discretion is to be exercised."<sup>21</sup>

Second, the formality of American regulatory processes was addressed in a comparative study with Swedish practices in the enforcement of health and safety regulations by Steven Kelman. Indeed, he observed that the best word in his opinion to describe the various aspects of the American process was "formal":

OSHA lays out inspection procedures in great detail. Inspections take the form of searches for violations. They result in formal citations (and penalties) for specific regulatory infractions. These citations are frequently formally contested by employers. If contested,

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16. *Id.* at 21.

17. *Id.*

18. Smith, *supra* note 2, at 93 (emphasis in original).

19. D. VOGEL, *supra* note 2, at 188. See also Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD J. LEGAL STUD. 253 (1983).

20. S. KELMAN, *REGULATING*, *supra* note 2, at 178.

21. Smith, *supra* note 2, at 93.

OSHA must formally prove, in a court setting, that the violation did in fact occur. The process of enforcing the rules thus itself goes according to well-defined rules.<sup>22</sup>

Similarly, matters of regulatory policymaking in the United States are articulated in a much more formal way through public rulemaking. The process is also ostensibly conducted in a more scientific fashion. For instance, officials involved in American chemical regulation rely much more on formal, quantitative methods of appraisal such as economic analysis and risk assessment, and make their data and reasoning public to a much greater extent than is the case in Europe.<sup>23</sup> In keeping with this broader conception of publicity, interested parties are allowed to take part in regulatory proceedings much more readily and information is generally available. This position should be contrasted with that in Britain where there is a strong tradition of confidentiality (some would say secrecy) in public affairs. In Britain policy is not a product of public rulemaking, but rather tends to evolve slowly within the regulatory organization. It is the culmination of an extensive series of consultations or of ad hoc decisions.<sup>24</sup> Policymakers in Britain receive from the formal law—and pass on to enforcement officials—substantial administrative discretion, by contrast with the United States, of course, where there is a distrust of such discretion and where a determination to eliminate as much of it as possible is evident in the proliferation of detailed rules.

It is difficult to be confident in making statements about the third theme—the greater stringency or punitiveness of American practice in the enforcement of regulation—because of a surprising and unfortunate lack of readily available, detailed ethnographic analyses on the one hand, and the existence of some evidence of regional variations in enforcement practices on the other. Nevertheless, the general view in the literature is that American regulatory enforcement is much more explicitly organized around legal sanctions, with a correspondingly greater concern to punish violations of rules.<sup>25</sup> Thus it is no surprise to read that OSHA inspectors issue citations at more than half the visits they make.<sup>26</sup> The contrast with British practice is particularly striking here: whereas United States regulators take companies to court “more frequently than those of any other country,” according to Vogel, “prosecution in Great Britain is extremely rare.”<sup>27</sup> In the United States there is a richer array of civil and criminal penalties and no apparent reluctance to resort to formal legal channels.<sup>28</sup> In Britain, in contrast, the focus of enforcement efforts is not so much on sanctioning strategy—to punish the breach of a rule—but rather on remedying a problem wherever possible by a general strategy of compliance.<sup>29</sup> Regulation and its

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22. Kelman, *Enforcement of Occupational Safety and Health Regulations: A Comparison of Swedish and American Practices*, in *ENFORCING REGULATION 99* (K. Hawkins & J. Thomas eds. 1984) [hereinafter *KELMAN, ENFORCEMENT*].

23. R. BRICKMAN, *supra* note 2.

24. P. Manning, *The Policy Process in the NII* (1987) (unpublished manuscript on file at the Centre for Socio-Legal Studies but prepared for the exclusive use of the British Health and Safety Executive).

25. E.g. E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

26. S. LLOYD-BOSTOCK, *LEGALISM AND DISCRETION: A STUDY OF RESPONSES TO ACCIDENTS AND ACCIDENT INFORMATION SYSTEMS IN THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)*, USA 21 (1988).

27. D. VOGEL, *supra* note 2, at 21.

28. *Id.* at 162–64.

29. K. HAWKINS, *ENVIRONMENT*, *supra* note 6, at 105–28.

processes are created by, and sanctioned by, a formal legal structure, but a much leaner and sparer one than in America. Enforcement is conducted informally, and relies heavily upon negotiation in which bargaining plays a crucial role. This is the consequence of a desire to solve problems if necessary by compromise and conciliation rather than coercion and compulsion in a relentless and uncompromising pursuit of a particular outcome (as the American approach would inevitably be characterized by British officials). Formal law enforcement in Britain is regarded as a matter of last resort. It is crucial to stress the word "formal" here, by which I again mean prosecution, since legal actors who work in a compliance system regard the attainment of their agency's broad legal mandate—clean rivers, safe factories, and the like—as the enforcement of the law. In general, the differences in approach outlined suggest that Americans like to solve problems by resorting to the formal procedures of the law, whereas in England the general aim is to solve problems by avoiding the formal law. With such an approach the formal process in England is reserved for rather rare cases which demand, by reason of their willful or culpable wrongdoing, their notoriety, or their persistent noncompliance, a public display of sanctioning.<sup>30</sup> The result of these various differences is a very public, adversarial process in the United States, involving extensive use of judicial review. This stands in clear contrast with the situation in Britain.

## B. *Explanations*

The commentators, in seeking to account for some of these striking differences in American and British approaches, have generally looked to political, historical, or cultural explanations. These three themes will be considered in turn.

### 1. *Political*

In the United States the regulatory process is conceived of as inherently political, and public participation and openness are deemed essential. In Britain the conception is not fundamentally political and legalistic as in the United States, but regulation is instead considered an administrative process. It is a process mandated by law, of course, but one conducted by consensus.

Indeed consensus is institutionalized, for example, in British occupational safety and health regulation. The Health and Safety Commission is the body which has broad responsibility for the formulation of occupational health and safety policy.<sup>31</sup> It also oversees the activities of the Health and Safety Executive,<sup>32</sup> which in turn presides over the work of various inspectorates.<sup>33</sup> The Commission's membership is comprised of the various interested groups: representatives of the Confederation of British Industry (the employers' association), the Trades Union Council, and the Local Authorities (the latter have certain health and safety enforcement respons-

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30. K. HAWKINS, *ENVIRONMENT*, *supra* note 6, at 177-83; K. Hawkins, *Prosecution*, *supra* note 8.

31. Health and Safety at Work etc Act, 1974, ch. 37, §§ 10(1), 11(2).

32. *Id.* §§ 11(4), 14(2).

33. *Id.* §§ 18(1), 19(1)-(3).

ibilities).<sup>34</sup> What to American eyes seems to be a recipe for capture is seen in Britain as a chance for consultation; an apparent risk of corruption is in Britain an opportunity for cooperation.

The Commission was deliberately designed in this way so that differences in policy could be resolved in negotiation in an effort to promulgate realistic and workable regulations at the outset. The institution is consciously planned to avoid conflict. Indeed, it is as if the central government in Britain is deliberately seeking to foreclose the possibility that formal legal processes may be employed in many forms of regulatory control by encouraging the use of techniques, such as self-regulation, which rely on administrative strategies rather than on devices susceptible to legal challenge.

Certainly the whole political environment of regulation is starkly different in the two countries. American regulation appears to an outsider to be suffused with politics at all levels. Turner Smith has observed that American environmental regulation is "driven by an intense grass roots, nationwide political commitment to effective environmental control" which produces a rapidly evolving policymaking.<sup>35</sup> In England, the process of environmental regulation is low key, essentially private, and much less politicized. Questions of implementation are not conceived of as legal and judicial—and ultimately political—matters, but as managerial ones. Regulation, in contrast with the American position, tends to be slower, more orderly and predictable, and nonlegalistic.<sup>36</sup>

The political process in the United States is very pluralistic and responsive to the interests and power of ordinary people. As a result, it is not difficult to place issues on the national political agenda. In Britain politics are very different with strong political parties which exert a powerful central control. They tend, correspondingly, to be intolerant of decentralized initiatives and relatively unresponsive to the regulatory issues that the pressure groups and the interested public want to have addressed.<sup>37</sup>

The American liking for the certainty and continuity of specific legal rules rather than discretion in regulation probably springs from a number of political sources. One might be the sheer scale of the task. The rules are, after all, intended to regulate what is as much a continent as a country, and this might well pose particular problems for control. The United States has larger numbers of governmental, administrative, and commercial units, a greater population of strangers,<sup>38</sup> and problems arising from the interrelationship between multiple state and federal jurisdictions. These factors may all contribute to the much more conspicuous desire to get both regulators and those regulated to go by the book.<sup>39</sup>

At the same time, it is important to note the low standing of the bureaucracy in

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34. *Id.* § 10(3).

35. Smith, *supra* note 2, at 92.

36. *Id.*

37. *Id.* at 93.

38. Formal legal processes tend to be employed more regularly in the absence of the social ties which bind together people in continuing relationships.

39. E. BARDACH & R. KAGAN, *supra* note 25.

the United States in comparison with that of Great Britain, where, in the opinion of the American lawyer Turner Smith, the bureaucracy is smaller, probably more professional, and technically better qualified.<sup>40</sup> This is accompanied in Britain by an apparently greater faith in the quality and competence of civil service personnel than is the case in America. The British civil service is still regarded as an appropriate career for able people, and it attracts many of relatively high social status, in turn conferring a degree of public standing that few other occupations can hope to attain. All this encourages a sense of trust, which is accompanied by a greater legislative willingness to grant substantial administrative discretion. Such public trust in the basic decency and competence of the civil service assists in fostering a view of the essential legitimacy of governmental intervention in Britain by contrast, it seems, with the United States.

This benign and deferential British view of political authority is possible because the public seems not to be particularly distrustful of government in general. The British public seems not to distrust big business either. At the same time, the business community in Britain is largely willing to cooperate with government.<sup>41</sup> Vogel's research yielded no business executive in Great Britain who could cite an instance where his firm had been required to do something "unreasonable," and the author suggests this indicates a favorable attitude toward government.<sup>42</sup> In the United States, on the other hand, tension between government and business, according to Vogel, has led to frequent accusations of mutual "bad faith."<sup>43</sup> Vogel was led to the conclusion that America should be regarded as a "business civilization"—a society in which civil servants occupy relatively low status, in which business is deeply suspicious of government intervention, and where much of the public tends to distrust both government and business.<sup>44</sup>

## 2. *Historical*

Given Vogel's remarks about the relative recency of legalistic behavior in American social regulation, it is important to be cautious in evaluating the merits of explanations which emphasize historical or cultural differences. Yet at the same time, the explanations should not be readily dismissed if only because the general nonlitigiousness of social regulation in Britain appears to obtain in other areas of legal life, such as the pursuit of civil claims.<sup>45</sup>

One author who has sought to integrate a historical perspective into his explanation of current national differences in regulation is Steven Kelman.<sup>46</sup> In his survey of the enforcement of health and safety regulations in the United States and

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40. See Smith, *supra* note 2, at 91-96.

41. D. VOGEL, *supra* note 2, at 21-22.

42. *Id.* at 21.

43. *Id.* at 22.

44. *Id.* at 26.

45. See, e.g., D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD, & Y. BRITTON, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 45-78 (1984).

46. Kelman, *Enforcement*, *supra* note 22, at 111-16.



Sweden, Kelman explored the distinct preference for nonlegalistic enforcement which was apparent among the Swedes. His findings tally with Vogel's. Among Swedish regulatory inspectors, Kelman discerned a markedly greater degree of trust that companies would comply with the law without litigation and punishment than was found among their American counterparts.<sup>47</sup> This trust essentially characterizes their work. One example drawn from Kelman's findings illustrates the point. American and Swedish health and safety inspectors were asked about their attitudes toward the trustworthiness of business. Of the American inspectors surveyed, fifty-six percent agreed with the statement: "Without the penalty-imposing powers we have, many employers would simply ignore the standards." Only fifteen percent of the Swedish inspectors agreed with the statement.<sup>48</sup> Such a benign view accords with my own findings from research in Britain with both water pollution inspectors<sup>49</sup> and factory inspectors,<sup>50</sup> a substantial majority of whom believe that most industrialists try to comply with the law as a matter of principle.

Kelman adopted a historical explanation to account for the striking differences in approach to regulation that he, as an American, observed in Sweden. His argument, very briefly, is as follows. In the past Europe was ruled by hereditary elites. There were brutally sharp distinctions between the ruler and the ruled. This led to a dominant value system which encouraged deference to authority, a value system which has essentially survived political reforms.<sup>51</sup> Out of American history, on the other hand, emerged values that encouraged self-assertion and a reluctance to acquiesce in authority. The early colonists settled in America at a time when the first challenge to hereditary rule was taking place in England. "In America," Kelman writes, "the starting point was individuals defining personal goals. . . . And in contrast to Europe, though unequal classes certainly existed, nobody had been born to rule."<sup>52</sup> It came to be regarded as legitimate for people in America to define and pursue their own paths, to assert themselves. Furthermore, "the forces of individual interest, once legitimized, are not easily controlled," and normative inducements for compliance are likely to be ineffective as a mode of social control.<sup>53</sup> In these circumstances, coercive legal punishment is demanded.

In discussing social regulation more specifically, Kelman argues that self-assertive victims are quick to demand that their interests be taken into account.<sup>54</sup> At the same time, self-assertive victimizers resist altering their behavior.<sup>55</sup> Conflict is resolved by the mechanism of the adversary trial, which is regarded as very important because it is most congruent psychologically with self-assertive values.<sup>56</sup> Law,

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47. S. KELMAN, *REGULATING*, *supra* note 2, at 195-99.

48. *Id.* at 197.

49. K. HAWKINS, *ENVIRONMENT*, *supra* note 6, at 110-11.

50. K. Hawkins, *Prosecution*, *supra* note 8.

51. Kelman, *Enforcement*, *supra* note 22, at 111-12.

52. *Id.* at 112.

53. *Id.*

54. *Id.* at 114.

55. *Id.*

56. *Id.*

therefore, comes to be conceived of as a way of dealing with objections to the legitimacy of administrative decisionmaking.<sup>57</sup> In Europe, on the other hand, administrative power grew out of the monarch whose legitimacy and authority were never questioned. According to this part of Kelman's explanation, therefore, the sheer amount of law in American regulation stems at least in part from the imposition of an adversary system upon governmental agencies in a problematic area of socio-legal control.

### 3. *Cultural*

It does seem from the work of both Kelman and Vogel that differences in the social regulation of countries such as the United States, Britain and Sweden reflect fundamental differences in the countries' social attitudes and culture. Two different conceptions of human—and, indeed, organizational—conduct are evident from the contrasting ways in which regulation is enforced in the United States and Britain. In America the individual is regarded as calculating and self-assertive. In Britain the individual is regarded as trusting and deferential. American regulation is designed and implemented on the economic premise that people will comply with the law only if they are subject to clearly defined standards which are closely monitored and subject to the threat of a significant legal sanction.<sup>58</sup> This view of the individual as a purposive, informed, and rational actor is tied with a penal philosophy which displays great faith in the efficacy of individual and general deterrence, and generally supports a policy of legal activism. In Britain, there seems to be a less rationalist (some would say less cynical) view of human or organizational conduct. The prevailing belief is that people are reasonably capable of regulating themselves without frequent or prominent displays of legal activity: they tend to be "political citizens" rather than "amoral calculators."<sup>59</sup> As a result, attainment of the broad legal mandate is sought in transactions marked by greater flexibility, privacy, and informality. A compliance strategy of enforcement, relying on techniques of persuasion, advice, education and the like, is appropriate as long as people are regarded as fundamentally reasonable, as acting in good faith, as generally trustworthy, and as inclined to accept advice.<sup>60</sup>

The general lack of publicity surrounding the regulatory process in Britain reduces the opportunities for issues to become public and political matters, and thereby (to an extent) legal matters. Lawyers, indeed, play a very marginal part in the whole process: in fieldwork I carried out in studying the enforcement of water pollution regulation in England and Wales, I encountered over a period of more than

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57. *Id.* at 114–15.

58. See *supra* note 47 and accompanying text.

59. Kagan & Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in *ENFORCING REGULATION 67* (K. Hawkins & J. Thomas eds. 1984).

60. See K. HAWKINS, *ENVIRONMENT*, *supra* note 6, at 105–28; R. Baldwin, *Rules at Work* (1987) (unpublished manuscript on file at the Centre for Socio-Legal Studies but prepared for the exclusive use of the British Health and Safety Executive); H. Genn, *Great Expectations: The Robens' Legacy and Employer Self-Regulation* (1987) (unpublished manuscript on file at the Centre for Socio-Legal Studies but prepared for the exclusive use of the British Health and Safety Executive).

two years only one lawyer present during (but not taking an active part in) negotiations between his company and the water authority inspector.<sup>61</sup> The discrepancy arises because enforcement of regulation is played as a kind of game between regulatory inspectors and regulated firms, where a common move of the latter is to depict themselves as highly compliant.<sup>62</sup>

Just as it is possible to think of two contrasting conceptions of the individual in British and American regulatory institutions and practices, it is also possible to consider two contrasting models of law implied by them. Robert Kagan has recently proposed two ideal-typical models that are particularly apt.<sup>63</sup> In the first, which Kagan calls "law as authoritative ideal," law is regarded as "an authoritative expression of widely held ideals or societal imperatives."<sup>64</sup> Here legal rules are accepted as just or necessary. Citizens, organizations, and officials are assumed to be responsive to the law, and sanctions tend to be mild and remedial in purpose. Legal rules are framed in general terms and judges and administrators are trusted in the exercise of their discretion in applying general norms or policies in particular instances. Negotiated policies and outcomes are preferred since there are few disputes about the fundamental legitimacy of the process.<sup>65</sup> In Kagan's second model, "law as political instrument," he envisages a society in which law is viewed as an instrument in a struggle among groups for political and economic advantage.<sup>66</sup> In such a society, the balance of power and political advantage tends to alter, resulting in corresponding shifts in legislative, judicial, and administrative ideologies and political allegiances.<sup>67</sup> The result, according to Kagan, is a view of formal law as "manipulable and malleable," and:

its correspondence to social ideals and needs [is] always questionable, disputed, and changing. In such a legal culture, compliance with the law by citizens or legal officers could not be taken for granted, for they might challenge or evade orders that they consider unfair. Sanctions and remedies must therefore be designed to have a powerful deterrent effect. Political and economic groups seek rules spelling out their rights in unambiguous terms, so that they may be used as swords against the resistant or as shields against unjustified intrusions on one's freedom.<sup>68</sup>

To guard against the possibility of favoritism or political manipulation by adverse interests, the law attempts in such a society to control the exercise of official discretion. Accordingly, procedural rules give affected citizens and their legal representatives rights to participate in factfinding and official decisionmaking.

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61. K. HAWKINS, *ENVIRONMENT*, *supra* note 6, at 187 n.12. It should be unnecessary to observe here that in discussing the dominant model of the regulated firm and individual, I am describing a composite view as seen through the eyes of officials in the regulatory agencies; in practice it appears, as might be expected, that people do not behave in such a principled way. H. Genn, *supra* note 60.

62. This does not necessarily threaten the general view that the authors I have cited are seeking to establish about the compliant and conciliatory British. This view may still be relatively true.

63. Kagan, *What Makes Uncle Sammy Sue?*, 21 *LAW & SOC'Y REV.* 717, 728-32 (1988) (reviewing D. VOGEL, *NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES* (1986)).

64. *Id.* at 728.

65. *Id.*

66. *Id.* at 729.

67. *Id.*

68. *Id.*

Finally, Kagan says that negotiated outcomes are suspect in such a regime because they smack of bargains struck cynically in an effort to attain compliance with official demands.<sup>69</sup> "One should fight for one's rights, whether those rights are explicit or inchoate,"<sup>70</sup> says Kagan, in a comment which perhaps captures the essence of what we are led to believe is the prototypical American view of law and legal processes.

Kagan does not suggest that the situation in Britain precisely accords with the model of law as an authoritative ideal, nor that the vision of law as a political instrument accurately describes how things are in America. He does argue persuasively, however, that there is on balance a measure of correspondence, referring to the characteristically American tendency to challenge the legitimacy of a law and its agents, and finding this tendency to be less evident in other countries.<sup>71</sup>

In Britain, the central values of regulatory enforcement are those of conciliation and compromise.<sup>72</sup> In a sense the process is ironically characteristic of the empiricist and pragmatist spirit of the English common law, where policy and principle emerge incrementally, ad hoc, as answers to practical problems. This spirit yields a flexible but cautious and particularistic law which coalesces around a broad principle, an outgrowth of pragmatism rather than of abstraction. In regulation, as well as in other areas of legal life, these features are associated with notions of trust, and of deference to authority. These in turn lead to a certain paternalism and a corresponding respect for the administrative expertise and authority represented by the regulatory agency and its officers. Associated with these attitudes is a willingness to regard authority as essentially benevolent and to trust the exercise of discretion by legal actors, even though they may be administrative rather than judicial officials. The final irony is that, to the extent that the broad legal mandate is attained in British social regulation, it occurs because legal actors are willing to avoid using the formal processes of the law.

### III. FOREGROUND: EMPIRICAL STUDY OF SOCIAL REGULATION IN BRITAIN

I want now to sharpen the focus a little, and introduce some empirical material. I hope to be able to convey briefly a sense of the constraints against too ready a use of the formal processes of prosecution in British social regulation, as experienced by those who have the primary responsibility for making such decisions. My remarks are drawn from a series of lengthy, structured conversations conducted in England with a carefully drawn sample of factory inspectors.<sup>73</sup> These officers are responsible for

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69. *Id.*

70. *Id.*

71. *Id.* at 729-32.

72. See generally K. HAWKINS, ENVIRONMENT, *supra* note 6, at 7-15.

73. There were 52 inspectors involved in the research. The sample was drawn from four administrative areas, two of which were selected for their propensity to use prosecution, two for their apparent reluctance to prosecute. The sample included area directors and principal officers, as well as inspectors in the 1B (i.e., trained field officer) grade. The interviews (with four exceptions) were tape recorded and quotations which follow are verbatim, being taken directly from tape transcripts. I also draw from further tape-recorded interviews with various members of the Health and Safety Executive itself, as well as chief inspectors of a number of HSE Inspectorates. This research was partly funded by a grant from the Health and Safety Executive, which I wish to acknowledge with thanks. The views expressed are mine, and not necessarily those of the HSE.

general monitoring and inspection work and if they decide<sup>74</sup> that a case warrants prosecution, they themselves actually conduct the case in the Magistrates' Court. Lack of space reduces me to little more than a listing of some of these constraints.

#### A. Policy

Policy statements may come from the top of the inspectors' organization, the Health and Safety Executive (HSE),<sup>75</sup> from the Chief Inspector of Factories,<sup>76</sup> or from the individual's area director or principal officer. Organizational policy, with some exceptions, supports an approach by inspectors which is committed to patience and reasonableness, by which is meant, *inter alia*, restraint in using prosecution. The following remarks by the Deputy Director-General of the HSE sum the position up well: "basically the inspector is required and expected to get results over time. The prosecution isn't just 'I came in on Wednesday and it was wrong, so I'll prosecute on Thursday.' We expect people to act in a strategic manner, rather than reacting in a parking warden manner."<sup>77</sup>

#### B. Political Climate

Inspectors are aware of a vague but real sense that the prevailing political view in Britain is unsympathetic to too extensive a system of social regulation or too stringent a policy of enforcement. In practical terms this means that it is not always propitious to use prosecution, which, as a drastic and public act, inevitably implicates the officer's organization symbolically in the action. To quote a principal officer: "I think there's a political climate that suggests that the civil service ought to be seen as assisting industry, and not acting as a purely prosecution-minded policeman. . . ."<sup>78</sup>

#### C. Officers' Theories of Compliance

The majority of factory inspectors have a relatively benevolent view of those whom they regulate as well as their incentives and motives for compliance. The majority of inspectors believe that most people comply with the law as a matter of principle.<sup>79</sup> People comply either because it is right to do so, or because there is a law which requires them to act in certain ways, and it is right to comply with the law. Although factory inspectors' experience tells them that they should routinely expect to find violations during site visits, and although they know that many employers have a substantial economic incentive not to comply with the law and do, indeed, regularly try to avoid complying with many regulations, they nevertheless believe that, as one of them put it, "[t]he vast majority of employers don't want to injure the

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74. Their decision is normally subject only to the approval of their supervising officer.

75. Health and Safety at Work etc Act, 1974, §§ 18(1)–(2).

76. *Id.* § 19(1). The HSE or other designated authorities appoint inspectors and define their powers.

77. See *supra* note 73 and accompanying text.

78. See *supra* note 73 and accompanying text.

79. The same is true of pollution control inspectors. K. HAWKINS, ENVIRONMENT, *supra* note 6, at 110–11.

health and safety of their employees.”<sup>80</sup> The significance of this underlying theory of compliance is that regulatory inspectors who believe it adopt an enforcement stance which emphasizes values of cooperation and understanding. They do not enter a plant looking for evidence of violations to punish, but to assist with problems. They engage with employers in an appropriately conciliatory fashion.

#### D. *Moral Culpability*

Although many British regulatory statutes are framed in terms of strict liability, one of the most pervasive and consistent features of the behavior of inspectors is a search for evidence of blameworthiness. For example, when asked what prosecutions conducted for the Mines and Quarries Inspectorate had in common, the Chief Inspector replied: “gross breaches, and *deliberate* breaches of legislation. Contraventions, *gross* and *deliberate*”<sup>81</sup> (his emphasis). When some precipitating event causes concern, the inspector applies a moral test, unless the event is so major or dramatic as to compel action for that reason alone. “The first threshold you go over,” said a principal officer, using a helpful metaphor, “is the question ‘Is prosecution *deserved*?’” Thus it is no surprise to discover that ninety-five percent of the inspectors in my sample reported that they had not prosecuted a blameless company.<sup>82</sup> These inspectors screen out the great majority of those noncompliant employers they deal with from further consideration for prosecution because the lack of moral culpability renders them ineligible for the formal processes of the law.

#### E. *Regulatory Vindictiveness*

Where there is a moral breach, however, the fault may be repaired before the prosecution takes place. If an employer makes conspicuous efforts to correct a problem, or if there are doubts in the inspector’s mind about the extent to which an employer was to blame in the first place, the moral props of the prosecution may be kicked away, prompting inspectors to think about whether prosecution in these new circumstances will appear vindictive. This draws attention to the symbolic nature of much prosecution activity, and suggests the extent to which the regulatory process in Britain is suffused not only with moral, but political ambivalence.<sup>83</sup> Regulatory agencies are caught between opposing publics with very different views about the extent to which the law should be recruited to intervene in economic life. Pro-regulation groups want a high level of activism and stringent enforcement; those adopting a *laissez-faire* attitude sympathetic to the interests of business want as little intervention as possible. In Britain, regulatory agencies inevitably advertise where they stand on this issue by their use of the power to prosecute. This is another important reason for prosecuting the blameworthy, for by so doing, the behavior condemned by law is placed within a framework which everyone can understand.<sup>84</sup>

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80. See *supra* note 73 and accompanying text.

81. See *supra* note 73 and accompanying text.

82. See *supra* note 73 and accompanying text.

83. K. HAWKINS, ENVIRONMENT, *supra* note 6, at 178.

84. *Id.*

#### F. *Resource Constraints*

Regulatory agencies and their inspectors are not blessed with unlimited resources. So far as the agency is concerned, prosecution is merely one move—and a very expensive one—in a wide variety of implementation tasks its inspectors need to carry out. Legal work, of which prosecution is a major part, accounts for nine percent of the total expenditure of resources by HSE and from an agency point of view, it becomes particularly important that prosecution is targeted selectively and carefully on the most appropriate cases.<sup>85</sup> Individual inspectors are similarly concerned about not devoting excessive time to a prosecution when they have so many competing demands to face. A decision to prosecute can involve an inspector in many hours (or even weeks) work spent in collecting evidence and preparing the case for trial, where, if the case is defended, there is always a risk of losing: “If you’ve got too much work on at the time,” said a field inspector, “then obviously you’ll say ‘Do I prosecute or don’t I prosecute? I haven’t got time to take the statements.’ And therefore prosecution falls by the wayside.”<sup>86</sup>

#### G. *Impact*

A constraint of a different kind is to be found in the pessimism often expressed by factory inspectors about the effectiveness of prosecution in furthering their general regulatory aims. It seems clear from their remarks that prosecution does not produce a simple and predictable result, that it may sometimes have a corrective impact (though the beneficial effects may well decay with time), but that equally it may be harmful: “. . . there’ve been times when I’ve felt it’s had some impact for the good,” said one inspector, “and there’ve been times when I’m certain it’s had some impact for the worse, in terms of my relationship with the firm . . . .”<sup>87</sup> It is important for inspectors to maintain good relationships with those whom they regulate, wherever possible, in view of the symbiotic nature of regulatory enforcement. Inspectors depend heavily on regulated firms for information and other forms of help simply to be able to do their job effectively. Using legal sanctions can be damaging.

#### H. *Constraints in the Law*

A final, and important, constraint against prosecution which needs to be mentioned is inherent in the way in which a law or regulation is actually framed and drafted.<sup>88</sup> Current legislation in Britain is a mixture of absolute and general duties placed on employers. Older legislation generally relies on absolute duties. Factory inspectors also prefer to use such legislation because prosecuting a breach of an absolute duty is quicker, simpler, and less likely to invite a defense. “You go for

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85. See *supra* note 73 and accompanying text.

86. See generally Hawkins, *FATCATS and Prosecution in a Regulatory Agency: A Footnote on the Social Construction of Risk* (article to be published in *Law & Pol’y*; cited here are pp. 12, 13, 25–31 in copy of unpublished typescript on file at the Ohio State Law Journal).

87. See *supra* note 73 and accompanying text.

88. See Hawkins, *FATCATS*, *supra* note 86, at 22.

section 14 of the Factories Act,"<sup>89</sup> said a principal inspector, "because it's absolute and there are hundreds of decided cases. You can't lose."<sup>90</sup> The section in question imposes an absolute duty upon an employer to guard against dangerous machinery.<sup>91</sup> Magistrates can understand the issues, and essentially have only to decide whether the machine was dangerous and whether it was guarded or not. Now contrast this straightforward position with that which confronts the factory inspector contemplating prosecuting under section 2 of the Health and Safety at Work etc Act, 1974.<sup>92</sup> This legislation, the modern cornerstone of occupational health and safety law in Britain, has placed a series of general duties upon employers. These duties tend to make prosecution not only a riskier, but also a more cumbersome proposition for inspectors. Some acknowledge that they are deterred from prosecuting under section 2, subsection (1) of which states that it is "the duty of every employer to ensure, *so far as is reasonably practicable*, the health, safety and welfare at work of all his employees."<sup>93</sup> The indeterminacy of the notion of reasonable practicability opens the way to all sorts of difficulties for inspectors. The notion is more contentious and invites a defense, thereby making real the risk of losing.<sup>94</sup> It also gives ultimate discretion to the court to define what it thinks is reasonably practicable in a system of law which requires proof beyond reasonable doubt. It demands that the seriousness of the risk be weighed against the costs of compliance. It also leaves the court to decide what is "safe" behavior. Of course what is "reasonably practicable" is also contingent upon the degree and kind of risk to the worker, the difficulties of proof mounting as the risks lessen or become more nebulous. One inspector nicely summed up the practical impact of this form of legislation: "It's nice to be able to get a case where there's an absolute duty. There's no doubt about that . . . . At one time the words 'reasonably practicable' filled me with dread."<sup>95</sup>

#### IV. CONCLUSION

In presenting this brief survey of some rather detailed data, I am conscious of the fact that any kind of comparative analysis has to be conducted intuitively, in terms of what an American audience knows—or thinks it knows—about corresponding practices in the United States. It is unfortunate that, so far as I am aware, no similar studies have been conducted in America.<sup>96</sup>

Yet I hope I have made a case that comparative socio-legal studies are a valuable means of understanding the nature of legal behavior and the place and role of law in contemporary societies. The common origins of English and American legal systems promise to make cross-national studies of current processes and practices in the two countries particularly worthwhile. Yet research needs to be more sensitive to the

89. Factories Act, 1961, 9 & 10 Eliz. 2, ch. 34, § 14.

90. See *supra* note 73 and accompanying text.

91. Factories Act, 1961, 9 & 10 Eliz. 2, ch. 34, § 14.

92. Health and Safety at Work etc Act, 1974, ch. 37, § 2.

93. *Id.* § 2(1) (emphasis added).

94. This is true even though the burden for proving the limits of reasonable practicability are on the accused. Health and Safety at Work etc Act, 1974, ch. 37, § 40.

95. See *supra* note 73 and accompanying text.

96. The nearest, perhaps, is Kelman's. S. KELMAN, REGULATING, *supra* note 2.



complexities of this topic. By this I mean that we need to resist succumbing to the easy global generalization.<sup>97</sup> Many Americans do not behave in a combative, litigious fashion when they have a grievance.<sup>98</sup> Others have shown that in the field of social regulation, considerable variation exists within the United States to the extent that regulators adopt a strategy of compliance or sanctioning in enforcing federal surface coal mining regulations.<sup>99</sup>

We also need to be more alert to other potentially important features which have received less attention in some of the work published so far. For example, structural differences between jurisdictions may prove to be very important in enhancing legal consciousness in the population<sup>100</sup> or in providing the means of mobilizing the law. The institutions through which people can prosecute, file suit, complain, review, or otherwise bring a problem to the attention of the law may indeed be crucial. Thus, the tradition of confidentiality in British public affairs is likely to be quite important in reducing the scope and avenues for challenge to official discretion, just as the rule about costs in civil claims (the loser pays) and the absence of a contingency fee arrangement may well serve to depress the level of access to the courts for intending claimants.<sup>101</sup> For similar reasons it is essential to study the structure of legislation and the way in which it is framed. It may well be the case, so far as regulatory studies are concerned, that adoption of a legislative form relying on a broad mandate and general duties (as in the key British occupational health and safety legislation) is less conducive to legal dispute and debate than one which relies heavily on a multiplicity of specific rules.

Yet, if in my earlier remarks discussing the American style of regulatory enforcement the reader detects a hint of skepticism or a note of agnosticism, this is a reflection of the fact that we still do not really have a great deal of empirically secure knowledge about how regulation in all its facets actually works. Detailed ethnographic studies of regulatory policymaking, implementation and enforcement are a valuable means of understanding the nature of routine legal processes, and such research is to my knowledge particularly lacking in the United States, quite apart from comparative studies. If we want to understand the place and impact of law—any kind of law—in British and American societies which must confront and tackle similar problems of social order and control, there is no substitute for actual empirical knowledge about how regulatory and legal systems work.

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97. For examples of this tendency, see L. FRIEDMAN, *supra* note 1; D. VOGEL, *supra* note 2.

98. The work of David Engel in a rural county in Illinois is one example that serves as an important corrective to uncomplicated assertions about the prevalence of contemporary American litigiousness in civil suits. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984). See also Felstiner, Abel & Sarat, *supra* note 1.

99. N. SHOVER, D. CLELLAND & J. LYNXWILER, ENFORCEMENT OR NEGOTIATION: CONSTRUCTING A REGULATORY BUREAUCRACY (1986). Variations in regulatory enforcement also exist in England. See B. HUTTER, THE REASONABLE ARM OF THE LAW? THE LAW ENFORCEMENT PROCEDURES OF ENVIRONMENTAL HEALTH OFFICERS (1988).

100. For example, what impact does a system of socialized medicine have on people's propensity to file suit for compensation?

101. This was the contingency fee position in early 1989. The present government may try to introduce a modified contingency fee system in its overhaul of the legal profession and legal services.

